

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

2015 JAN 21 PM 4: 34

FIRST GENERAL COUNSEL'S REPORT

CELA

MUR: 6821

DATE COMPLAINT FILED: May 14, 2014

DATE OF NOTIFICATION: May 21, 2014

LAST RESPONSE RECEIVED: July 7, 2014

DATE ACTIVATED: October 23, 2014

ELECTION CYCLE: 2014

EXPIRATION OF SOL: April 23, 2019 –

April 26, 2019

COMPLAINANT:

Jennifer M. Horn, New Hampshire Republican State
Committee

RESPONDENTS:

Shaheen for Senate and Michelle Chicoine in her
official capacity as treasurer

Jeanne Shaheen

Senate Majority PAC and Rebecca Lambe in her
official capacity as treasurer

Democratic Senatorial Campaign Committee and
Deanna Nesburg in her official capacity as
treasurer

RELEVANT STATUTES
AND REGULATIONS:

52 U.S.C. § 30104(b)¹

52 U.S.C. § 30116

11 C.F.R. § 109.21

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

I. INTRODUCTION

This matter involves allegations that Jeanne Shaheen, a 2014 candidate for Senate in New Hampshire, Shaheen for Senate ("Shaheen Committee"), her principal campaign committee, and the Democratic Senatorial Campaign Committee ("DSCC") coordinated a television advertisement with the Senate Majority PAC ("SMP"), an independent expenditure-only political

¹ On September 1, 2014, the Federal Election Campaign Act of 1971, as amended (the "Act"), was transferred from Title 2 to the new Title 52 of the United States Code.

committee, resulting in an impermissible and unreported contribution in violation of 52 U.S.C. §§ 30116 and 30104(b) (formerly 2 U.S.C. §§ 441a and 434(b)). The Complaint alleges the Shaheen Committee posted a message on its website, later linked on the DSCC's Twitter page, which SMP subsequently republished as the script for the advertisement.

The Respondents maintain that the SMP advertisement did not republish Shaheen Committee campaign materials and was not otherwise coordinated, and there is no available information to suggest otherwise. Accordingly, we recommend that the Commission find no reason to believe that the Respondents violated 52 U.S.C. §§ 30116(a), 30116(f), and 30104(b) (formerly 2 U.S.C. §§ 441a(a), 441a(f), and 434(b)).

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Background

On April 23, 2014, the Shaheen Committee posted a message on its campaign website that read:

More attack ads. Paid for by the Koch Brothers and their special interest money.

More proof big oil, the Koch Brothers and Wall Street think they can buy our Senate seat for Scott Brown.

When Brown was the Senator from Massachusetts he gave big oil and Wall Street billions in special breaks. They gave him millions in campaign contributions.

Jeanne Shaheen voted to stop those special breaks. She's leading the fight for a bipartisan bill to lower energy costs for consumers and create jobs.

Jeanne Shaheen. Making a difference for New Hampshire.²

The Shaheen Committee website included two additional links on the same page as the message:

(1) "High res images," for which an archived page is not available, and (2) "Click here to get the

² *An Important Message for New Hampshire*, SHAHEEN FOR SENATE (Apr. 23, 2014), available at <https://web.archive.org/web/20140425002606/http://jeannshaheen.org/message/>.

1 facts," which linked to a seven-page document containing background information on Scott
2 Brown's alleged involvement with Charles G. and David H. Koch and the oil and financial
3 industries.³ The following day, the DSCC posted a link on Twitter to the message on the
4 Shaheen Committee website that said, "Koch brothers are trying to buy Scott Brown a Senate
5 Seat. Read why here."⁴

6 SMP subsequently distributed a television advertisement entitled "Baggage" beginning
7 on April 25, 2014. According to Federal Communications Commission ("FCC") filings, the total
8 media buy was \$212,000.⁵ The script of that advertisement provided:⁶

AUDIO	ON-SCREEN MESSAGE
"Scott Brown's carrying some big oil baggage. In Massachusetts, he voted to give oil companies big breaks—they make record profits, he collects over four hundred thousand in campaign contributions."	Scott Brown: Voted for Bog Oil Tax Breaks <i>New York Times</i> , 5/17/11 Vote #72, 5/17/11 Scott Brown: More than \$400,000 in Campaign Contributions from Oil & Gas Center for American Progress, 2/7/12 Center for Responsive Politics, 4/8/14
"Now Brown is shopping for a new Senate seat. Where? In oil-rich Texas? The oil fields of North Dakota?"	Texas North Dakota
"Nope, Brown wants to bring his big oil baggage to New Hampshire."	New Hampshire Scott Brown's Big Oil Baggage

³ *Id.*

⁴ See <https://twitter.com/dscc/status/459433019669884929> (Apr. 24, 2014 4:45 PM EST).

⁵ See [https://stations.fcc.gov/collect/files/73292/Political%20File/2014/Non-Candidate%20Issue%20Ads/Senate%20Majority%20PAC/Senate%20Maj%20PAC%204.24%20\(13983630339222\).pdf](https://stations.fcc.gov/collect/files/73292/Political%20File/2014/Non-Candidate%20Issue%20Ads/Senate%20Majority%20PAC/Senate%20Maj%20PAC%204.24%20(13983630339222).pdf).

⁶ See Senate Majority PAC, *Baggage*, YOUTUBE (published May 8, 2014), <https://www.youtube.com/watch?v=GkjjRSZYDwc>.

"Scott Brown: Out for himself and big oil at our expense."	Scott Brown: Out for himself at our expense
"Senate Majority PAC is responsible for the content of this advertising."	Paid for by Senate Majority PAC, www.senatemajority.com. Not authorized by any candidate or candidate's committee. Senate Majority PAC is responsible for the content of this advertising.

The Complaint alleges that the "Baggage" advertisement satisfies the Commission's

three-part regulatory test for coordination. First, the Complaint asserts that, because SMP paid for the advertisement, it satisfied the payment prong.⁷ Second, the Complaint contends that the advertisement satisfied the content prong because it republished campaign materials and expressly advocated against Scott Brown.⁸ Third, the Complaint generally asserts that the Respondents satisfied the request or suggestion, material involvement, or substantial discussion standards under the conduct prong, alleging that the Shaheen Committee and the DSCC "communicated by their websites and social media material information and requests and suggestions for the SuperPAC . . . to create an illegal coordinate communication, including republication of campaign materials."⁹ The Complaint therefore contends that the Respondents' coordination of the advertisement resulted in an impermissible contribution in violation of 52 U.S.C. §§ 30116 and 30104(b) (formerly 2 U.S.C. §§ 441a and 434(b)).

All of the Respondents deny that the communication was coordinated. The joint response of the Shaheen Committee and Jeanne Shaheen ("Shaheen Response") disputes that the script for "Baggage" was posted on the Shaheen Committee website.¹⁰ It states that the message on the Shaheen Committee website was not a request or suggestion that any group make a

⁷ Compl. at 2.

⁸ *Id.*

⁹ *Id.*

¹⁰ Shaheen Resp. at 2.

1 communication on the Committee's behalf and was only a means to disseminate information
2 about Scott Brown.¹¹ The Response asserts that aside from some thematic similarities between
3 the Shaheen Committee's website and the SMP advertisement, the Complaint presents no
4 evidence of coordination between Shaheen, the Shaheen Committee, and SMP.¹² Shaheen and
5 her Committee assert that they did not request or suggest that SMP create the advertisement, did
6 not have any involvement in the creation, production, or dissemination of the advertisement, and
7 did not discuss with SMP the campaign's plans, projects, activities or needs.¹³

8 The Shaheen Response also argues that the content and conduct prongs of the
9 coordination analysis are not satisfied. The Response disputes that the advertisement contained
10 express advocacy or its functional equivalent.¹⁴ It also contends that the advertisement did not
11 republish campaign materials because it did not copy any of the original Shaheen campaign
12 materials and only contained thematic similarities based on well-known criticisms of Scott
13 Brown.¹⁵ Finally, the Response argues that the conduct prong is not satisfied because the
14 Commission has stated that the conduct prong cannot be satisfied by a general request on a
15 publicly available website.¹⁶

¹¹ *Id.*

¹² *Id.* at 3.

¹³ *Id.*

¹⁴ *Id.* at 5.

¹⁵ *Id.* at 4.

¹⁶ *Id.*; see Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 432 (Jan. 3, 2003) (explanation and justification) ("The 'request or suggestion' conduct standard in paragraph (d)(1) is intended to cover requests or suggestions made to a select audience, but not those offered to the public generally."); Coordinated Communications, 71 Fed. Reg. 33,190, 33,205 (Jun. 8, 2006) (explanation and justification) ("Under the new safe harbor, a communication created with information found, for instance, on a candidate or political party's website, or learned from a public campaign speech, is not a coordinated communication if that information is subsequently used in connection with a communication.").

1 The DSCC Response is substantially similar to the Shaheen Response. The DSCC
2 asserts that it did not request or suggest that SMP create the advertisement, did not have any
3 involvement in the creation, production, or dissemination of the advertisement, and did not
4 discuss with SMP the campaign's plans, projects, activities, or needs.¹⁷

5 The SMP Response also argues that the coordination standards are not satisfied. It
6 asserts that the Complaint presents no evidence of a request or suggestion specifically directed at
7 SMP.¹⁸ The Response further asserts that the material involvement or substantial discussion
8 conduct standards cannot be satisfied if information is obtained from a publicly available
9 source.¹⁹ SMP asserts that the Complaint is premised on a mistake of fact because the
10 advertisement's script was finalized on April 10, 2014 and production was complete on April 21,
11 2014.²⁰ The Response argues that, given this timing, there is no way the Shaheen Committee's
12 website message could have informed the content of "Baggage."²¹ Finally, SMP asserts that it
13 utilizes a firewall and thus only specific information showing the flow of material information is
14 sufficient to overcome a presumption that the conduct standards have not been satisfied.²²

15 **B. Legal Analysis**

16 Under the Act, an expenditure made by any person "in cooperation, consultation, or
17 concert, with, or at the request or suggestion of, a candidate, his authorized political committees

17 DSCC Resp. at 3.

18 SMP Resp. at 4.

19 *Id.*

20 *Id.* at 2, 5.

21 *Id.*

22 *Id.* at 5.

1 or their agents" constitutes an in-kind contribution.²³ A communication is coordinated with a
2 candidate, an authorized committee, a political party committee, or agent thereof if it meets a
3 three-part test: (1) payment for the communication by a third party; (2) satisfaction of one of
4 four "content" standards of 11 C.F.R. § 109.21(c); and (3) satisfaction of one of six "conduct"
5 standards of 11 C.F.R. § 109.21(d).²⁴

6 It does not appear that the alleged activities of the Respondents in connection with the
7 advertisement here satisfied any of the conduct standards. First, the advertisement does not
8 appear to contain republished campaign materials.²⁵ Although the Shaheen Committee website
9 message and the SMP advertisement share similar themes concerning Brown's tax breaks for
10 "big oil" and his alleged receipt of large campaign contributions in return, there is no overlap in
11 the language or images of the two communications. Respondents note that these topics were
12 well-known criticisms of Brown during his 2012 Senate campaign in Massachusetts and point to
13 other advertisements with similar themes from that election.²⁶ The Shaheen Committee
14 campaign materials also cover several different topics that are not addressed in the SMP
15 advertisement, including Brown's relationship with the financial industry, with Charles G. and
16 David H. Koch, and Jeanne Shaheen's position on these issues. And unlike other recent matters
17 that involved groups using video footage produced by candidates' authorized committees, the

²³ 52 U.S.C. § 30116(a)(7)(B)(i) (formerly 2 U.S.C. § 441a(a)(7)(B)(i)).

²⁴ See 11 C.F.R. § 109.21.

²⁵ See 11 C.F.R. § 109.21(d)(6).

²⁶ Shaheen Resp. at 4; DSCC Resp. at 4.

1 SMP advertisement does not actually republish any campaign materials.²⁷ Accordingly, it does
2 not appear that "Baggage" satisfied the republication standard.²⁸

3 The Complaint also alleges generally that the Respondents' conduct satisfied the request
4 or suggestion, material involvement, and substantial discussion conduct prongs.²⁹ Although the
5 Responses are unsworn and do not include affidavits, all of the Respondents deny that the

6 advertisement was coordinated and specifically assert that there was no request or suggestion,
7 material involvement, or substantial discussion. The Complaint itself fails to identify any
8 communication between the representatives of the Shaheen Committee, the DSCC, and SMP.
9 Rather, it relies on the public messages placed on the Shaheen Committee website and DSCC
10 Twitter page as evidence of coordination. The Commission has expressly stated, however, that a
11 communication resulting from a general request to the public or the use of publicly available
12 information, including information contained on a candidate's campaign website, does not
13 satisfy the conduct standards.³⁰

14 Further, the alleged thematic similarities of the two communications at issue and their
15 rough temporal proximity do not give rise to a reasonable inference that any of the conduct

²⁷ See, e.g., MUR 6357 (*American Crossroads*); MUR 6777 (*Kirkpatrick for Arizona*); MUR 6801 (*Senate Majority PAC*).

²⁸ A communication that republishes campaign materials prepared by a candidate's authorized committee is an expenditure and an in-kind contribution for purposes of contribution limitations and reporting responsibilities of the person making the expenditure, regardless of whether the communication was coordinated with the authorized committee. See 52 U.S.C. § 30116(a)(7)(B)(iii) (formerly 2 U.S.C. § 441a(a)(7)(B)(iii)) and 11 C.F.R. § 109.23. Because we conclude that the SMP advertisement did not republish Shaheen Committee campaign materials, there is also no reason to believe that SMP made a prohibited or excessive contribution through republication that was not coordinated with the Shaheen Committee or the DSCC.

²⁹ 11 C.F.R. § 109.21(d)(1)-(3).

³⁰ See Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 432 (Jan. 3, 2003) (explanation and justification); Coordinated Communications, 71 Fed. Reg. 33,190, 33,205 (Jun. 8, 2006) (explanation and justification).

standards were satisfied under the facts presented here, particularly where no other information suggests that the Respondents engaged in any of the activities outlined in the relevant conduct standards.³¹

Because the conduct prong of the coordinated communications test was not satisfied here, we recommend that the Commission find no reason to believe the Respondents violated

52 U.S.C. §§ 30116(a), 30116(f), and 30104(b) (formerly 2 U.S.C. §§ 441a(a), 441a(f), and 434(b)).³²

III. RECOMMENDATIONS


1. Find no reason to believe that Shaheen for Senate and Michelle Chicoine in her official capacity as treasurer, Jeanne Shaheen, the Democratic Senatorial Campaign Committee and Deanna Nesburg in her official capacity as treasurer, and Senate Majority PAC and Rebecca Lambe in her official capacity as treasurer violated 52 U.S.C. §§ 30116(a), 30116(f), and 30104(b) (formerly 2 U.S.C. §§ 441a(a), 441a(f), and 434(b));
2. Approve the attached Factual and Legal Analyses;
3. Approve the appropriate letters; and

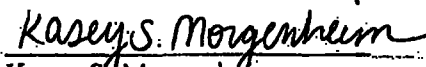
³¹ Cf. MUR 6613 (Prosperity for Michigan) (dismissing allegations of coordination-based solely on thematic similarities and timing in matter in which respondents denied the advertisement was coordinated).


³² The Complaint does not allege that SMP failed to report the cost of "Baggage" as an independent expenditure, nor do the Responses address this issue, although that reporting issue flows necessarily from the allegations of coordination in the Complaint. See 52 U.S.C. § 30104(g)(2) (formerly 2 U.S.C. § 434(g)(2)). Nonetheless, we note that on April 25, 2014, SMP filed a 24/48 Hour Report of Independent Expenditures disclosing \$317,831.63 in total expenditures for a communication opposing Scott Brown, including \$16,931.63 for media production costs and \$300,910.00 for media buys. See Senate Majority PAC, 24/48 Hour Report of Independent Expenditures (Apr. 25, 2014). Although this figure differs from the \$212,000 media buy reported to the FCC, it appears likely that the independent expenditure report related to "Baggage," given the timing of the advertisement's distribution and the lack of information suggesting SMP ran a different advertisement opposing Scott Brown during this period. Accordingly, we make no recommendation regarding the reporting issue.

4. Close the file.

1/21/15
Date


Daniel A. Petalas
Associate General Counsel
for Enforcement


Kasey S. Morgenheim
Attorney


Allison T. Steinle
Attorney

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